IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Melanie L. Liebert, Petitioner	:	
v.	:	No. 1438 C.D. 2010
	:	Submitted: December 3, 2010
Unemployment Compensation Board of Review, Respondent	:	

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE JOHNNY J. BUTLER, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE LEAVITT FILED: September 26, 2011

Melanie L. Liebert (Claimant) petitions for review of an adjudication of the Unemployment Compensation Board of Review that denied Claimant benefits under Section 402(e) of the Unemployment Compensation Law (Law) by reason of willful misconduct.[1] In doing so, the Board reversed the Referee's decision that Employer did not prove dishonesty by Claimant. Concluding that the Board erred, we reverse.

On November 29, 2004, Claimant began employment as an investigator in the adjustments department of what was then known as the National

[1] Act of December 5, 1936, Second Ex. Sess., P.L. (1937) 2897, *as amended*, 43 P.S. § 802(e). Section 402(e) of the Law provides, in pertinent part, that an employee is ineligible for compensation where "his unemployment is due to his discharge or temporary suspension from work for willful misconduct connected with his work…." 43 P.S. § 802(e).

City Bank (Employer).[2] She earned $21,000 per year. On October 8, 2009, Employer fired her for falsifying her timesheets. Claimant filed a claim for benefits at the Duquesne UC Service Center, and her claim was granted.

Employer appealed, and a hearing was conducted by a Referee on January 19, 2010, at which Employer did not appear. Claimant testified briefly. She explained that Employer fired her because she did not record her authorized break periods on her timesheet and that Employer considered this omission fraudulent. Claimant testified that in six years of employment, she had never recorded the break periods on her timesheets and that she did not knowingly or intentionally violate a work rule.

The Referee concluded that Claimant had been discharged for dishonesty, which Claimant denied. Accordingly, the burden shifted to Employer to establish the dishonesty, and Employer did not do so because it did not appear at the hearing. The Referee granted Claimant benefits.

On February 5, 2010, Employer appealed to the Board, asserting that it never received notice of the Referee's hearing and requesting a new hearing. The Board granted Employer's request and remanded the matter to the Referee to act as hearing officer for the Board. In its remand order, the Board directed that Employer had to prove proper cause for its nonappearance at the previous hearing. Further, the Board directed that both parties were permitted to present evidence on the merits of the case. However, if Employer did not demonstrate proper cause for its nonappearance at the prior hearing, the Board would not reach the merits of the case.

[2] In 2009, National City Bank became PNC Bank.

At the hearing, Jodie Fine-Sheriff, a senior employee relations investigator for Employer, explained that National City Bank was now PNC Bank, and this change had affected the processing of unemployment cases; however, the address of Employer's unemployment representative remained unchanged. She claimed that neither PNC nor the representative had received notice of the hearing. The Referee found that his office had simply sent Employer's original hearing notice to the wrong address. In fact, Employer's hearing notice had been returned to the Referee's office marked undeliverable by the U.S. Post Office.

Madeline Bodenhemier, Claimant's supervisor, testified next. She explained that she developed a suspicion that Claimant was falsifying time records. Then, on October 5, 2009, she was unable to locate Claimant at work, causing her to investigate. Bodenhemier retrieved Claimant's case management records and telephone records for the prior month. Bodenhemier explained that Claimant's phone has a menu for auxiliary time. "That is when associates – that's an option that associates have to choose on their phone menu to indicate that they are not working." Notes of Testimony, May 12, 2010, at 8 (N.T. ___). Claimant's phone had been placed on auxiliary time for 59 minutes at lunch time on October 5, 2009; however, Claimant's timesheet for that day stated that she took a 30-minute lunch break.

On October 8, 2009, Bodenhemier questioned Claimant regarding this timesheet discrepancy, and Claimant responded that she had added her two ten-minute break periods to her 30-minute lunch break. Bodenhemier acknowledged that Claimant was permitted to take two ten-minute breaks each day and to use those breaks to extend her lunch period by 20 minutes. However, this required management approval, which Claimant had not obtained.

Bodenhemier also testified about Claimant's timesheet for October 2, 2009, which showed Claimant working from 7:00 a.m. to 3:00 p.m., without taking a lunch break. Bodenhemier testified that employees were required to take a lunch break.[3]

Bodenhemier testified that Employer had a written policy in its handbook regarding the completion of timesheets and that employees were to sign an acknowledgement of receipt of the handbook. Bodenhemier stated that the policy provided that the paid ten-minute breaks did not need to be recorded on the timesheet. However, she did not assert that the written policy required an employee to get approval before adding paid breaks to the unpaid 30-minute lunch break. Bodenhemier testified that she believed Claimant was falsifying her timesheets.

Employer's written policy was not offered into evidence. Employer did not offer evidence that Claimant had acknowledged receipt of the written policy.

On cross-examination, Bodenhemier testified that during the two years that she supervised Claimant, the subject of how to fill out a timesheet had never been raised. When asked whether Claimant, who was salaried, received additional compensation by not recording her break periods, Bodenhemier replied that Claimant could receive overtime. When asked if Claimant had actually received overtime or excess compensation as a result of the way she completed her timesheets, Bodenhemier replied that she had no evidence of such an overpayment.

[3] Although Bodenhemier claimed that employees were required to take a lunch break, she did not assert that Claimant actually took a lunch break on the day in question. In other words, she did not testify that Claimant's time sheet for October 2, 2009, was false.

Nevertheless, she went on to observe that if Claimant had worked less than 40 hours per week, her pay could have been docked.

Claimant testified that since she started working for Employer she had added her two ten-minute breaks to her lunch period. The October 8, 2009, meeting with Bodenhemier was the first time Claimant had ever been questioned about her timesheets. Claimant stated that she did not remember ever receiving an employee handbook.

Claimant was asked whether she left her work station to go into the mall and buy breakfast. She acknowledged leaving her work station on occasion, and for periods of time in excess of her permitted two ten-minute breaks. Claimant explained that these absences were caused by her anxiety and panic attacks. Claimant stated that she had taken a three-month leave from work in 2009 due to anxiety issues.[4] Claimant acknowledged that when she left her desk because of a panic attack, she did not inform anyone and did not record that as unpaid time on her timesheet. When questioned about this practice, Claimant stated that everyone was aware she had medical issues. She did not believe it was necessary to keep track of her time in this manner as she "was never getting paid anything extra." N.T. 17. Employer did not question Claimant about the lack of a lunch break being recorded on her October 2, 2009, timesheet, nor did it question Claimant about the additional nine-minute absence from her October 5, 2009, timesheet.

[4] Claimant submitted documentation that she had been receiving psychiatric treatment for anxiety and panic disorder since April 8, 2009. Certified Record Item No. 17 (C.R. ___), Exhibit C-1. On May 5, 2009, she requested leave under the Family and Medical Leave Act (FMLA), 29 U.S.C. §§2601-2654. At that time, her psychiatrist certified Claimant unable to work due to anxiety and panic attacks. On July 2, 2009, her psychiatrist reported that Claimant remained unable to work due to her anxiety and panic attacks and extended her FMLA leave for an additional month. C.R. 17, Exhibit C-1 at 2. Claimant returned to work in August 2009.

The Board found that Employer's failure to appear at the first hearing was caused by the hearing notice being addressed incorrectly. Accordingly, the Board found that Employer had good cause not to appear at the first hearing.

The Board then addressed the merits of the case. It found Claimant was entitled to a 30-minute lunch break and two additional ten-minute breaks, totaling fifty minutes. It found that on October 5, 2009, Claimant was away from her work station for "approximately" 59 minutes, whereas her timesheet recorded a 30-minute lunch break. Board Opinion at 1, Finding of Fact No. 4. It also found that even if Claimant was permitted to add all of her break times together, the maximum allowable absence was 50 minutes, and Claimant did not account for the remaining nine minutes. The Board also found, based on Claimant's admissions, that she was taking breaks in excess of the two ten-minute periods provided to her and without permission. Finally, the Board did not find Claimant's testimony credible that she left her work station because of panic attacks. It made no findings about the October 2, 2009, timesheet.

The Board concluded that Claimant's conduct fell below the reasonable standards of behavior an employer had the right to expect of an employee because she took breaks without notifying Employer. The Board did not place any significance upon the existence or content of Employer's written policy. The Board concluded that Claimant's discharge was attributable to her willful misconduct, rendering her ineligible for benefits.

Claimant now appeals.[5] Claimant first argues that Employer did not prove a violation of a work rule, which was required to prove willful misconduct.

[5] Our scope of review is limited to determining whether constitutional rights were violated, errors of law committed or if the necessary findings of fact were supported by substantial
(Footnote continued on the next page . . .)

Second, Claimant argues that a single incident of failing to record a nine-minute period on her timesheet, *i.e.*, the length of time her phone was on auxiliary time, does not constitute willful misconduct. Third, Claimant argues that because Employer allowed her to conduct herself in the way she did for six years, it cannot now categorize this behavior as willful misconduct. Finally, Claimant argues that Employer cannot terminate her for willful misconduct because her additional breaks were taken for health reasons.

We begin with a review of the law on willful misconduct. Although not defined in the Law, the courts have established that it means the following:

> (1) an act of wanton or willful disregard of the employer's interest;
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> (2) a deliberate violation of the employer's rules;
>
> (3) a disregard of standards of behavior which the employer has a right to expect of an employee; and
>
> (4) negligence indicating an intentional disregard of the employer's interest or the employee's duties and obligations to the employer.

Altemus v. Unemployment Compensation Board of Review, 681 A.2d 866, 869 (Pa. Cmwlth. 1996). It is the employer's burden to establish that a claimant's conduct constituted willful misconduct. *Conemaugh Memorial Medical Center*, 814 A.2d at 1288. To establish willful misconduct in the violation of a work rule, the

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evidence. *Ductmate Industries, Inc., v. Unemployment Compensation Board of Review*, 949 A.2d 338, 341 n.2 9 (Pa. Cmwlth. 2008). However, "[w]hether an employee's action constitutes willful misconduct is a question of law subject to judicial review." *Conemaugh Memorial Medical Center v. Unemployment Compensation Board of Review*, 814 A.2d 1286, 1288 (Pa. Cmwlth. 2003).

employer must establish the existence of the rule, its reasonableness, and that the employee was aware of the rule. *Bishop Carroll High School v. Unemployment Compensation Board of Review*, 557 A.2d 1141, 1143 (Pa. Cmwlth. 1989).

Here, Employer asserted that Claimant violated a work rule by failing to record any lunch break on her October 2, 2009, timesheet. Employer also asserted that Claimant violated a work rule by adding her two ten-minute break periods to her allotted lunch break on October 5, 2009, without prior approval. The only evidence about the existence and content of these work rules was Bodenhemier's testimony; Employer did not place the written policy into evidence. Bodenhemier's testimony was problematic in that she did not provide the time frame for the adoption of these rules, which was relevant given the change in management; nor did she state that Claimant was aware of such rules. Claimant denied any knowledge of the rules, and Bodenhemier admitted she never discussed them with Claimant.

In any case, the Board did not find that Claimant violated a work rule. Instead, the Board concluded that Claimant violated the "standards of behavior which the employer has a right to expect of its employees even though they may not be expressly set forth in the employment agreement or by the employer's rules."[6] Board Opinion at 3. Thus, it is irrelevant that Employer may not have

[6] In its decision the Board did not find that a work rule was violated. It also did not find that Claimant committed willful misconduct for taking a lunch in excess of 30 minutes. Instead, it found her guilty of willful misconduct for failing to account for nine minutes of her 59-minute lunch. It further found her guilty of willful misconduct on the basis that she took undisclosed breaks for purported panic attacks. Yet, in its brief to this Court the Board does not claim, as it did in its decision, that Claimant's conduct violated the standards of behavior which an employer had a right to expect. It instead argues that Claimant's conduct violated a work rule. It then claims that Employer's testimony that the work rule existed and that Claimant was aware of it was sufficient. This now claimed existence of a work rule is contrary to the Board's decision. **(Footnote continued on the next page . . .)**

proved a violation of a work rule, and Claimant's argument on this point is likewise irrelevant.

In Claimant's second allegation of error, she contends that a single failure to record a nine-minute absence on a timesheet does not constitute willful misconduct. Claimant argues that under the principles established in *Williams v. Unemployment Compensation Board of Review*, 380 A.2d 932 (Pa. Cmwlth. 1977), a nine-minute discrepancy is insignificant. The Board counters that Claimant admitted that she was away from her work station without permission on numerous occasions and did not record all of them on her timesheet. In this way, Claimant "effectively stole time from Employer." Board's Brief at 9.

Claimant was terminated because of two incidents of alleged misconduct. The first was Claimant's completion of a timesheet on October 2, 2009, which did not list a lunch break. The second was her completion of a time sheet on October 5, 2009, that listed a 30-minute lunch break when she actually took a 59-minute lunch, based on her phone records.

As to the October 2, 2009, incident, Employer's testimonial evidence did not establish that it advised Claimant that she must take a lunch break each day. Likewise, Bodenhemier did not testify that Claimant had, or had not, taken a lunch break on October 2, 2009. She stated only that Claimant did not record a lunch break. Willful misconduct would have been shown had Employer's evidence demonstrated that Claimant took a lunch break but did not record it as a

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As the Board is without authority to make new findings of fact and conclusions of law by way of a brief to this Court, we refuse to consider an argument contrary to the one provided for in the decision. *See* Pa. R.A.P. 1701(b)(3) and 1512(a)(1) (reconsideration of an order may only be granted within 30 days of the final order). Further, as noted above, Employer provided absolutely no evidence that the work rules existed or that Claimant was aware of them.

way to receive compensation to which she was not entitled. However, Employer's evidence was inconclusive and did not prove fraud.

The second incident involved the 59-minute lunch break that occurred on October 5, 2009. Employer admitted that Claimant was not required to list the two ten-minute break periods on her time sheet. Accordingly, a time sheet that lists a 30-minute lunch period, which was in reality 50-minutes long, was permissible. To deny Claimant benefits, we must conclude that her failure to record a nine-minute absence from her work station on her timesheet, on one occasion, constitutes willful misconduct.

In *Williams*, the employer had adopted a policy that "an employee absent for seven days must notify the employer of his absence every seventh day in writing and that an employee absent for fifteen days without such notification will be discharged." 380 A.2d at 933. The employee had notified the employer that he would be absent from work due to a wrist injury, but he did not provide the employer with a written certificate within the seven-day period. When his absences exceeded fifteen days, he was terminated. The Board found that the employee had knowingly violated the employer's work rule and was, thus, guilty of willful misconduct. Although this Court accepted the Board's findings, we held that

> [t]he cases wherein a single incident was held to constitute willful misconduct indicate that this determination has been made only where the single incident was "sufficiently serious" to justify that finding….

Id. at 934-935.

We explained that examples of serious conduct include unauthorized deliveries and misrepresentations; diversion of company property from a

designated destination to a private garage; improperly selling company property; concealing the identity of a prospective customer in a bad faith attempt to extract additional remuneration; and assaulting a co-worker. *Id.* at 935 (emphasis added). By contrast, single incidents of minor infractions, such as missing a meeting, not remaining indoors while on home confinement, and reclining in the company truck during work time, are not "sufficiently serious" to constitute willful misconduct. *Id*.

The Board argues that falsifying a timesheet, for any duration, constitutes willful misconduct. Employer notes that in *Temple University of the Commonwealth System of Higher Education v. Unemployment Compensation Board of Review*, 565 Pa. 178, 772 A.2d 416 (2001), the Pennsylvania Supreme Court concluded that it was willful misconduct to falsify employer's records in order to receive additional pay, even where it was done with a supervisor's permission.

Employer's evidence on the nine-minute absence consists solely of Bodenhemier's testimony, which, in turn, was based upon phone records that were never introduced into evidence. Bodenhemier's testimony was subject to a hearsay challenge. Although Claimant did not raise that objection, "[u]nder the 'legal residuum' rule, hearsay evidence admitted without objection will be given its natural probative effect [only] 'if it is corroborated by any competent evidence in the record.'" *Greer v. Unemployment Compensation Board of Review*, 4 A.3d 733, 737 n.7 (Pa. Cmwlth. 2010) (quoting *Walker v. Unemployment Compensation Board of Review*, 367 A.2d 366, 370 (Pa. Cmwlth. 1976)). Here, there is no such corroboration in the record. Claimant did not admit to an absence of that duration, and Bodenhemier did not testify from her own observation and knowledge. The

Board found that Claimant accounted for 50 of the "approximately" 59 minutes that Employer asserted she had been absent from her "work area." Finding of Fact 4. The failure of Claimant to account for nine minutes does not prove dishonesty.

First, Employer did not establish that Claimant, a salaried employee, was required to treat every minute recorded in auxiliary time as unpaid leave, *i.e.*, as if she were punching a time card.[7] Second, Employer did not establish that it expected exact precision in timesheets. Claimant may have visited the restroom before and after her 50-minute lunch break; Employer did not assert that restroom breaks were unpaid. Third, Bodenhemier's testimony about auxiliary time was inconclusive. For example, her testimony did not rule out the possibility that Claimant was actually at her desk working for nine minutes but neglected to change her phone setting. Fourth, Employer did not even claim that Claimant would have been terminated for not recording a nine-minute absence from her desk. Employer claimed that willful misconduct occurred because Claimant took a 59-minute lunch and only recorded 30 minutes of it on her timesheet, *i.e.*, a 29-minute discrepancy. The Board found, instead, that a nine-minute discrepancy had occurred. Employer did not present any evidence that it would have terminated an employee for a nine-minute absence from her desk. In sum, we cannot find that the nine-minute discrepancy between Claimant's timesheet and her phone records, assuming those records were accurately described by Bodenhemier, proved dishonesty.

[7] Employer did not offer evidence that employees were obligated to account for every minute of the workday, including all time that a phone was on auxiliary time. A work day may include minutes in a casual conversation with a co-worker or in a trip to the water cooler. Employer did not suggest that such "down" time had to be recorded.

Finally, we consider the Board's argument that Claimant admitted that she was often absent from her desk for unspecified periods of time due to panic attacks. The Board argues that these absences alone constitute willful misconduct. However, Employer did not discharge Claimant for these other absences. They cannot now be used as an additional basis for denying her benefits. *Ductmate Industries, Inc. v. Unemployment Compensation Board of Review*, 949 A.2d 338, 344 n.5 (Pa. Cmwlth. 2008) (in order to deny benefits, the act an employer asserts constitutes willful misconduct must actually be the act the claimant was terminated for committing).

For these reasons, we reverse the order of the Board, and the matter will be remanded to the Board for computation of benefits.[8]

MARY HANNAH LEAVITT, Judge

Judge Cohn Jubelirer dissents.

[8] Because we find in favor of Claimant, we need not consider her remaining two issues.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Melanie L. Liebert, Petitioner	:	
v.	:	No. 1438 C.D. 2010
Unemployment Compensation Board of Review, Respondent	:	

O R D E R

AND NOW, this 26th day of September, 2011, the order of the Unemployment Compensation Board of Review dated June 21, 2010, in the above captioned matter is hereby REVERSED and the matter REMANDED to the Unemployment Compensation Board of Review for further proceedings in accordance with the attached opinion.

Jurisdiction relinquished.

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MARY HANNAH LEAVITT, Judge